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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

HAROLD SMITH et al., Plaintiffs and Appellants, v. BALDWIN PARK, POST 3197, VETERANS OF FOREIGN WARS OF THE UNITED STATES, DEPARTMENT OF CALIFORNIA, Defendant and Respondent.	B174572 (Los Angeles County Super. Ct. No. KC036438)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daniel J. Buckley, Judge. Affirmed.

Stanley Z. White & Associates and Stanley Z. White for Plaintiffs and Appellants Harold Smith and Gary Smith.

Shaw, Terhar & LaMontagne, John W. Shaw, Eric A. Amador and Christopher M. McDonald for Defendant and Respondent Baldwin Park, Post 3197, Veterans of Foreign Wars of the United States, Department of California.

* * * * * *

Plaintiffs and appellants Harold Smith and Gary Smith appeal from a summary judgment entered against them and in favor of defendant and respondent Baldwin Park, Post 3197, Veterans of Foreign Wars of the United States, Department of California, on claims of negligence, assault, battery, false imprisonment, trespass to property and intentional infliction of emotional distress. Appellants' claims against respondent were based on injuries allegedly sustained from an attack by defendants Melvin Salas, Gabriel Bueno and Juan Macias, while attending a private party at Post 3197 hosted by defendant Ernest Sanchez.[1]

Appellants challenge the trial court's ruling only with respect to their negligence claim. Because we find that appellants have failed to create triable issues of material fact as to whether respondent had a duty to protect them and whether an ostensible agency relationship existed between respondent and the security guards at the premises, we affirm the summary judgment.

DISCUSSION

The Complaint

On July 16, 2001, brothers Harold and Gary Smith, who are African-American, filed a form complaint alleging that they were victims of a racially motivated attack by Hispanic defendants Salas, Bueno and Macias following a private party hosted by Sanchez on July 15, 2000 at Post 3197. Appellants alleged that when Harold went to his car at approximately 9:30 p.m., Salas, Bueno and Macias struck him with a beer bottle and a baton and stabbed him in the abdomen. Appellants also alleged that the security guards who were present at the premises took no steps to prevent or abate the attack, but instead encouraged the attack by providing a baton to one of the attackers. Appellants further alleged that Gary was also attacked and stabbed when he came to the rescue of his brother.

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[1] Salas, Bueno, Macias and Sanchez are not parties to this appeal.

Appellants asserted causes of action for negligence, assault, battery, false imprisonment, trespass to property and intentional infliction of emotional distress. Respondent was later added as a "Doe" defendant. As to the negligence claim, appellants alleged that respondent breached its duty of care by failing to exercise reasonable care in the hiring and supervising of the security guards.

The Motion for Summary Judgment

On December 23, 2003, respondent filed a motion for summary judgment or, in the alternative, for summary adjudication. Respondent did not address appellants' theory of negligent hiring. Instead, relying on *Rogers v. Jones* (1976) 56 Cal.App.3d 346, respondent argued that it could not be held liable for the sudden, intentional and criminal acts of third parties that it had no reasonable opportunity to anticipate or prevent. Respondent argued that there was no evidence that it had notice that the attack was going to be committed by Salas, Bueno and Macias. Respondent also argued that appellants' intentional torts lacked merit as to respondent because appellants admitted in their interrogatory responses that respondent did not cause them emotional distress or assault them.

In their opposition, appellants did not address respondent's argument that it could not be held directly liable for negligence. Nor did appellants address respondent's arguments that appellants' intentional tort claims had no merit. Instead, appellants opposed the motion on the ground that a triable issue of material fact existed as to whether the security guards were ostensible agents of respondent. Appellants relied solely on portions of Harold's deposition testimony to oppose the motion.

The trial court found that there was no triable issue as to any material fact, and granted summary judgment in favor of respondent on all causes of action.

Standard of Review

We review a trial court's ruling on a motion for summary judgment de novo, "considering 'all of the evidence set forth in the [supporting and opposition] papers,

except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612; *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 148; Code Civ. Proc., § 437c, subd. (c).) A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment meets this burden by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to the action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant makes this showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to that cause of action or defense. (*Barton v. Elexsys Internat., Inc.* (1998) 62 Cal.App.4th 1182, 1187.) To do so, a plaintiff cannot rely upon the mere allegations or denials of its pleadings, but "shall set forth the specific facts" showing a triable issue exists. (Code Civ. Proc., § 437c, subd. (p)(2).)

"In independently reviewing a motion for summary judgment, we apply the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue." (*Silva v. Lucky Stores, Inc*. (1998) 65 Cal.App.4th 256, 261.) Although our review of a summary judgment is de novo, it is limited to those issues which have been adequately raised and supported in the appellant's brief. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

Undisputed Facts

A review of the papers submitted by respondent and appellants in support of and in opposition to the summary judgment motion reveals the following undisputed facts:

Appellants attended a private party at Post 3197 on July 15, 2000. They were introduced to defendants Bueno and Macias, but had no conversation with them or with

defendant Salas inside Post 3197. Neither Bueno, Macias or Salas approached appellants, looked at them in a strange manner or made any type of adversarial gesture or motion toward appellants inside Post 3197. Appellants had no reason to believe that they would be attacked later that night.[2] Harold Smith exited Post 3197 at approximately 9:30 p.m. Shortly thereafter, Harold was assaulted, attacked, struck and battered by Bueno, Macias and Salas. The attack was sudden, unexpected and without notice.

Gary Smith learned that his brother Harold had been attacked and immediately exited Post 3197. He was then assaulted by Salas, Bueno and Macias. The attack on Gary was also sudden, unexpected and without notice. Salas, Bueno and Macias were not security guards.

Disputed Facts

In opposing the summary judgment motion, appellants proffered the following "disputed" facts:

Prior to entering Post 3197, appellants saw two Latino security guards wearing uniforms that consisted of white shirts on which was written, "Security," brown pants and black polished shoes, who were carrying batons and handcuffs. The security guards, who Harold Smith thought were employees of respondent, traveled throughout the facility. Salas appeared to Harold to be intoxicated. Outside in the parking lot, Salas asked Harold and his sister where they were going. When Harold's sister responded that they were going to a party in Los Angeles, Salas stated, "You niggers ain't going nowhere." Harold was then hit with a beer bottle and a baton.

Appellants also asserted that one of the security guards was seen passing his baton to Macias. But appellants' evidence in support of this "fact" was Harold's testimony that

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[2] Appellants attempted to dispute this fact by pointing to Harold's deposition testimony that Bueno had commented when meeting him that Harold looked sharp and that Harold *felt* that Bueno was envious of him because of his expensive clothes. But the page of Harold's deposition transcript to which appellants cite was *not* part of the record, and the trial court found this fact to be undisputed.

he saw Macias and a security guard engaged in what looked like a tug of war over the baton and Harold did not know if the guard voluntarily handed the baton over to Macias. Appellants also asserted that this security guard was present during the attack, that he aided and abetted the attack, and that he did not summon aid or call the police. But, again, the supporting evidence upon which appellants relied was Harold's testimony that prior to the attack, he looked over at the security guard who no longer had the baton, that he did not know whether the guard attacked him in any way, and that he did not know what the guard was doing during the attack.

The Trial Court Properly Granted Summary Judgment

Appellants contend that the trial court's summary judgment should be reversed because triable issues of material fact existed as to whether respondent had a duty to protect appellants and whether an ostensible agency relationship existed between respondent and the security guards. We disagree.

A. Respondent's Direct Liability

Appellants argue that respondent "voluntarily assumed the duty of care to protect Harold and Gary Smith by requiring the presence of security guards at an event held on its premises."

Appellants, however, did not argue a theory of direct liability in opposing the summary judgment motion. Appellants' written opposition to the motion stated: "In the present action, plaintiffs' causes of action against [respondent] rest on whether the security guard is an ostensible agent of [respondent]." Additionally, our review of the reporter's transcript of the hearing on the motion reveals that appellants' counsel stated the following: "I think the heart of our issue is whether there is . . . a factual question of whether he was an agent of the [respondent]. That's what we're proposing. That's why we're opposing the motion." "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be

considered by an appellate tribunal." (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.)

But even assuming this issue was raised and litigated below, we conclude it has no merit. Appellants assert in their opening brief that respondent "rented its facility to Ernest Sanchez for one night for his sister's birthday party and required that security guards be present at the event." In their opposition to the summary judgment motion, appellants similarly asserted that respondent "instructed the Sanchez party to hire a security guard for the party to protect the guests and the premises." But appellants have not cited any *evidence* to us to support these assertions. Appellants did not present either deposition testimony or a declaration from anyone acting on behalf of respondent or from defendant Sanchez to establish this purported fact. Thus, appellants' purported fact is absent from both the parties' separate statements of fact and from the record itself. "'On appeal our review is limited to the facts shown in the documents presented to the trial judge in making our independent determination of their construction and effect as a matter of law.' [Citation.] Facts not contained in the separate statement do not exist." (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 978-979.)

Moreover, there is no factual basis from which to infer that respondent required Sanchez to hire security guards, or that Sanchez did not hire them on his own initiative. Accordingly, we find that appellants have failed to create a triable issue of material fact as to whether respondent assumed a duty of care toward appellants.

B. Ostensible Agency Relationship

Appellants argue that the security guards were ostensible agents of respondent, and that respondent is therefore liable to appellants for the torts committed by its agents.

Civil Code section 2300 defines ostensible agency as follows: "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." "'Liability of the principal for the acts of an ostensible agent rests on the doctrine of "estoppel," the essential elements of which are representations made by the principal,

justifiable reliance by a third party, and a change of position from such reliance resulting in injury. [Citation.]'" (*Kaplan v. Coldwell Banker Residential Affiliates, Inc*. (1997) 59 Cal.App.4th 741, 748.) A party asserting such authority must show a change of position or injury resulting from such reliance. (Civ. Code, § 2334; *Pasadena Medi-Center Associates v. Superior Court* (1973) 9 Cal.3d 773, 780.) "Ostensible authority must be established through the acts or declarations of the principal and not the acts or declarations of the agent." (*Preis v. American Indemnity Co*. (1990) 220 Cal.App.3d 752, 761.) "[W]here the principal knows that the agent holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the principal may give rise to liability." (*Ibid*.)

"Although questions of ostensible agency usually involve triable issues of fact [Citation], they do so only if there is some evidence that the 'ostensible' principal in fact caused the third party to believe another to be its agent, and also some evidence that the third party actually harbored such a belief." (*LaChapelle v. Toyota Motor Credit Corp*. (2002) 102 Cal.App.4th 977, 992.)

Here, appellants have offered no evidence giving rise to a reasonable inference of ostensible agency. Appellants base their entire argument on the bald assertion that respondent required defendant Sanchez to hire security guards for the party. But, as noted above, appellants presented no evidence that respondent actually imposed such a requirement. Appellants make a number of other unsupported assertions. For example, appellants assert that the security guards greeted guests at the door and examined their invitations, that the guards were seen patrolling the parking lot, that appellant Harold Smith reasonably believed that the guards were respondent's employees, and that Harold's sister asked one of the guards for help during the attack. But there is no evidence in the record to support any of these assertions.

Once these unsupported assertions are set aside, the only *evidence* remaining on which appellants can rely to support their agency theory is that two men, dressed as security guards, were apparently policing the party and that Harold believed they were employees of respondent. But there was no evidence that the guards' uniforms referred

to respondent or that respondent, the guards or anyone else made any statements that the guards were respondent's employees. Nor, most importantly, is there any evidence that respondent even knew that security guards were present at the party.

Also absent from the record is any evidence that appellants actually relied upon the security guards' authority to act on respondent's behalf or that they changed their position on such reliance. Appellants put forth no evidence, for example, that their decision to attend the party in the first place was based on whether respondent would have security present or that once at the party they waited to walk into the parking lot until they saw a guard they thought was an employee of respondent.

We therefore conclude that appellants have failed to present any evidence to create a triable issue of material fact as to whether an ostensible agency relationship existed.

DISPOSITION

The summary judgment in favor of respondent is affirmed. Respondent is awarded its costs on appeal.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST